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OUT OF THE RABBIT HOLE: THE D.C. CIRCUIT BRINGS
THE EPA BACK FROM WONDERLAND IN
NEW JERSEY V. EPA

I. INTRODUCTION

Though few people noticed, in the early 1950s, increasing numbers of fish were floating dead in Minamata Bay, Japan.¹ Then, as if channeling Alfred Hitchcock, crows were seen inexplicably falling from the sky.² Cats started “dancing” in the streets.³ Neighbors then slowly began noticing each other stumble while walking, slur speech, and drop chopsticks at dinner.⁴ Then things started getting worse. Stumbles became full-blown paralysis; trouble holding chopsticks became gnarled hands and involuntary muscle spasms; and the newest generation of townspeople was born with horrific birth defects.⁵

The culprit was Minamata disease, more commonly known as mercury poisoning.⁶ In 1932, the Chisso Corporation, a pillar in the local community for decades, began to manufacture acetaldehyde, a chemical used for producing plastics.⁷ Mercury from the production process continuously leaked into Minamata Bay, where it amassed for years.⁸ A few years and a chemical process later, the mercury entered the food chain in the form of methylmercury chloride—a form of mercury that is easily absorbed by humans.⁹ The mercury accumulated in fish and shellfish—the townspeople’s sole

1. See Joseph Coleman, *50 Years Later, Many Victims of Japan’s Worst Eco-Disaster Still Struggle for Redress*, ASSOCIATED PRESS, Sept. 30, 2007 (providing brief history of Minamata disaster).

2. See *id.* (providing history of Minamata tragedy).

3. See Douglas Allchin, *The Tragedy and Triumph of Minamata: A Paradigm for Understanding Ecological, Human-Environment and Culture Technology Interactions*, 61 AM. BIOLOGY TCHR. 413, 414 (1999) (providing history of Minamata disaster). Cats would also be seen falling into the sea and dying, which townspeople began to term “cat suicides.” *Id.*

4. See *id.* (discussing early effects of mercury poisoning in Minamata Bay).

5. See Coleman, *supra* note 1 (providing brief history of Minamata disaster).

6. See *id.* (citing mercury poisoning as cause of Minamata disaster).

7. See Allchin, *supra* note 3, at 414 (discussing Chisso Corporation’s role in local economy).

8. See *id.* (discussing events leading up to mercury exposure in Minamata Bay).

9. See *id.* (explaining how mercury entered food chain); see also *Hold the Sushi*, THE ECONOMIST, Aug. 27, 2009, available at http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=14327176 (highlighting dangers still posed by mercury emissions).

source of protein.¹⁰ Two thousand townspeople died from eating contaminated fish and as many as thirty thousand others suffered from the symptoms of Minamata disease.¹¹

While today the Minamata tragedy is a distant memory to some, and a story glossed over in high school biology for others, it had the remarkable effect of kick-starting the Japanese environmental movement and waking up the international community to the horrifying effects of mercury exposure.¹² The Minamata episode illuminates a problem that lingers to this day: the dominant medium of mercury exposure is consuming fish with high levels of mercury.¹³ As a result of the Minamata tragedy, and an increased body of knowledge as to mercury's effects on humans, mercury exposure has become an enormous concern for governments and their environmental regulatory agencies.¹⁴

This Note analyzes the District of Columbia Circuit Court of Appeals' decision in *New Jersey v. EPA*¹⁵ to vacate two Environmental Protection Agency (EPA) determinations: (1) the decision to remove electric utility steam generating units (EGUs) from the list of sources of hazardous air pollutants (HAPs); and (2) the promulgation of the Clean Air Mercury Rule (CAMR), creating a voluntary cap-and-trade system for mercury emissions from EGUs.¹⁶ This

10. See Allchin, *supra* note 3, at 414 (noting particular danger of high mercury levels in fish for Minamata Bay townspeople).

11. See Coleman, *supra* note 1 (noting Japanese courts are forcing Japanese government to recognize many new victims of Minamata disease).

12. See *id.* (discussing the genesis of Japanese environmental movement). The Minamata tragedy "gave birth to the Japanese environmentalist movement, and like the Chernobyl nuclear meltdown and the Union Carbide chemical disaster in Bhopal, India, it became an international cause célèbre." *Id.* (discussing effects of Minamata disaster in public sphere).

13. See Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000) (removing electric utility steam generating units from list of sources of hazardous air pollutants). "[F]ish consumption dominates the pathway for human and wildlife exposure to mercury." *Id.* Mercury levels are particularly high in larger species of fish (e.g., shark, tuna, swordfish), as mercury accumulates as it moves up the food chain. See *Hold the Sushi*, *supra* note 9 (highlighting lingering dangers of mercury levels in fish).

14. See OFFICE OF AIR QUALITY, ENVTL. PROT. AGENCY, EPA-453/R-98-004A, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELECTRIC UTILITY STEAM GENERATING UNITS—FINAL REPORT TO CONGRESS 7-17 (1998) [hereinafter 1998 EPA HAP REPORT] (considering mercury as "highest priority for multipathway analyses"), available at <http://www.epa.gov/ttn/oarpg/t3/reports/eurtcl.pdf>.

15. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1308 (2009), and *cert. dismissed*, 129 S. Ct. 1313 (2009).

16. For a narrative analysis of *New Jersey v. EPA*, see *infra* notes 97-121 and accompanying text. For a critical analysis of *New Jersey v. EPA*, see *infra* notes 122-69 and accompanying text.

Note also analyzes the decision's potential impact on mercury regulations, as well as the effect that the decision may have on future regulation of other pollutants.¹⁷ A particular focus is placed on carbon dioxide (CO₂).¹⁸ Section II lays out the facts and procedural history of *New Jersey v. EPA*.¹⁹ Section III provides the legal framework needed to understand the regulatory process under the Clean Air Act (CAA).²⁰ Section IV provides a narrative of the court's reasoning in *New Jersey v. EPA*.²¹ Section V critically analyzes the court's reasoning and argues that the court correctly applied the law and reached the proper conclusion, albeit through a less than complete discussion.²² Finally, Section VI discusses the impact of the court's decision on the regulatory regime over new and existing EGUs.²³ This Note ultimately concludes that, while the decision may have closed the door on regulating EGU emissions of CO₂ under section 111 of the CAA, the holding does leave available a more substantial regulatory option in regulating CO₂ under section 112.²⁴

II. FACTS

The decision of the D.C. Circuit in *New Jersey v. EPA* finds its roots in the Clean Air Act Amendments of 1990 (1990 Amendments).²⁵ The 1990 Amendments required the EPA to conduct a study on the possible hazards to public health that can be reasonably anticipated from EGU emissions.²⁶ Based on the study's find-

17. For a discussion on how *New Jersey v. EPA* may affect future regulation of pollutants not yet listed as a HAP, see *infra* notes 196-220 and accompanying text.

18. For a discussion on how *New Jersey v. EPA* may impact carbon dioxide (CO₂) regulations, see *infra* notes 202-20 and accompanying text.

19. For a discussion of relevant facts in *New Jersey v. EPA*, see *infra* notes 25-59 and accompanying text.

20. For a discussion of relevant background material, see *infra* notes 60-96 and accompanying text.

21. For a narrative analysis of the court's opinion in *New Jersey v. EPA*, see *infra* notes 97-121 and accompanying text.

22. For a critical analysis of the court's opinion in *New Jersey v. EPA*, see *infra* notes 122-69 and accompanying text.

23. For a discussion of the impact on the regulatory structure over new and existing EGUs, see *infra* notes 170-223 and accompanying text.

24. For a discussion on how *New Jersey v. EPA* may affect CO₂ emission regulations, see *infra* notes 202-20 and accompanying text.

25. See ROBERT MELTZ & JAMES E. MCCARTHY, CONG. RES. SERV., ORD. NO. RS22817, THE D.C. CIRCUIT REJECTS EPA'S MERCURY RULES: *New Jersey v. EPA* 3 (2008) [hereinafter CRS, CASE REPORT], available at http://assets.opencrs.com/rpts/RS22817_20080228.pdf (discussing events leading up to *New Jersey v. EPA*).

26. See 42 U.S.C. § 7412(n)(1)(A) (2006) (requiring EPA to undertake study into reasonably anticipated health effects resulting from EGU emissions).

ings, the EPA Administrator would determine whether regulating HAP emissions from EGUs is “appropriate and necessary.”²⁷ This study was initiated soon after the 1990 Amendments were enacted, and in 1998 the findings were issued in the EPA’s report to Congress, *Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units* (the HAP Report).²⁸ The report presented an in-depth analysis of industry background, testing methods, and the health effects of several HAPs.²⁹ Mercury emissions, however, were of greatest concern due to the particular threat the chemical posed to humans.³⁰

Mercury is an especially potent and resilient neurotoxin that primarily targets the nervous system, kidneys and developing fetuses.³¹ It affects the respiratory, cardiovascular, gastrointestinal, hemotologic, immune and reproductive systems as well.³² Developing fetuses face the most serious risks because they are more likely to suffer from severe neurological and developmental problems at lower doses than those who are exposed in their adult years.³³ The

27. *See id.* (setting forth required findings for EPA to regulate HAP emissions from EGUs).

28. *See* 1998 EPA HAP REPORT, *supra* note 14 (reporting findings of study conducted under mandate of section 112(n)(1)(A)).

29. *See generally id.* (summarizing relevant information on industry background, testing methods, and health effects of several HAPs).

30. *See id.* at 7-45 (noting particular concern with health effects resulting from mercury exposure). “Mercury is considered the highest priority for multipathway analyses because it is an environmentally persistent, toxic element.” *Id.*

31. *See id.* at 7-17 (discussing health effects of mercury exposure). Incidents of high-dose and widespread exposure to methylmercury in Japan and Iraq have demonstrated that neurotoxicity is the greatest health concern when the developing fetus is exposed to methylmercury. *Id.* at ES-16 (mentioning highly publicized episodes of mercury exposure). The incident in Japan was the result of industrial releases of mercury into Minamata Bay; the mercury ultimately entered the food chain, poisoning thousands. For a further discussion of the episode, see *supra* notes 1-14 and accompanying text. In the winter of 1971-1972, a wave of methylmercury poisonings hit rural Iraq. *See* Center for Environmental Health Sciences at Dartmouth, *Mercury: Element of the Ancients*, <http://www.dartmouth.edu/~toxmetal/metals/stories/mercury.html> (last visited Oct. 27, 2009) (discussing mercury poisoning episode in Iraq). In what was initially a well-meaning humanitarian response to famine in the country, several nations sent wheat seeds that had been treated with a methylmercury-containing fungicide. *Id.* Warnings on the bags of seeds were printed in Spanish (many of the seeds had originated in Mexico) and were incomprehensible to rural Iraqis. *Id.* The skull and crossbones — a marking signifying poison in the West — meant nothing to the Iraqis. *Id.* Facing starvation, the Iraqis ground and milled the seed directly into flour, and made contaminated bread. *Id.*

32. *See* 1998 EPA HAP REPORT, *supra* note 14, at 7-17 (discussing biologic systems most affected by mercury exposure in humans).

33. *See id.* (noting particular vulnerability of developing fetuses to effects of mercury exposure). “Neurotoxicity in offspring is the most commonly observed effect and the effect seen at lowest exposures.” *Id.*

HAP Report cites impaired development of motor skills, “cerebral palsy, altered muscle tone and deep tendon reflexes, and reduced neurological test scores” as the most common effects of prenatal exposure to mercury.³⁴ Due to the particular risk that the developing fetus faces in suffering from these effects, the EPA has expressed the greatest concern for women of child-bearing age being exposed to mercury.³⁵

The HAP Report pointed to a “plausible link” between industrial emissions of mercury and methylmercury—an especially potent and dangerous form of mercury—in fish.³⁶ The EPA estimated that “roughly 60 percent of the total mercury deposited in the U.S. comes from U.S. anthropogenic air emission sources.”³⁷ Coal- and oil-fired EGUs represented the largest source of mercury in the United States, accounting for thirty to forty percent of domestic anthropogenic emissions.³⁸

In light of these findings, the EPA concluded that “fish consumption dominates the pathway for human and wildlife exposure to mercury.”³⁹ Accordingly, the EPA determined that EGU emissions of mercury were a threat to both public health and the environment.⁴⁰ Further, the EPA Administrator determined that it was appropriate and necessary to regulate HAP emissions from coal- and oil-fired EGUs under section 112 of the CAA.⁴¹ Section 112

34. *Id.* at 7-18 (mentioning common health effects upon exposure to mercury). The HAP Report particularly notes diminished abilities to walk and talk among fetuses affected by prenatal mercury exposure. *Id.*

35. See Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000) (expressing concern over women of child-bearing age consuming mercury-contaminated fish).

36. See 1998 EPA HAP REPORT, *supra* note 14, at 7-43 (finding link between EGU mercury emissions and mercury levels in soil, sediments, air and water). After being emitted into the air, mercury falls back to earth, entering streams, lakes and rivers, where it can accumulate in the flesh of fish. See Cornelia Dean, *Environmentalists Advance on Emissions*, N.Y. TIMES, Feb. 24, 2009, at A16 (discussing link between airborne mercury emissions and accumulation in fish).

37. Regulatory Finding on the Emissions of Hazardous Air Pollutants, 65 Fed. Reg. at 79,827 (estimating proportion of mercury emitted by domestic anthropogenic sources).

38. See *id.* (concluding EGUs represent substantial portion of domestic anthropogenic sources of mercury); *Hold the Sushi*, *supra* note 9 (attributing forty percent of anthropogenic mercury emissions to coal-fired power plants).

39. Regulatory Finding on the Emissions of Hazardous Air Pollutants, 65 Fed. Reg. at 79,827 (finding contaminated fish consumption is principal medium of mercury exposure).

40. See *id.* at 79,830 (stating Administrator’s findings regarding threat of mercury emissions to health and environment).

41. See *id.* at 79,830 (concluding EGU emissions of HAPs should be regulated under CAA section 112).

dictates that an appropriate and necessary finding is required before adding EGUs to the HAP source list.⁴²

The EPA then announced that the appropriate and necessary finding compelled the conclusion that coal- and oil-fired EGUs should be regulated under section 112 of the CAA.⁴³ The announcement was made with just one month remaining in the Clinton Administration, on December 20, 2000.⁴⁴ The EPA was then left to promulgate HAP emission standards for EGUs.⁴⁵

In early 2004, after a change in presidential administrations, the EPA proposed two alternative regulatory programs to control HAP emissions from coal- and oil-fired EGUs.⁴⁶ The first option would follow the proposal made by the EPA Administrator in 2000 and regulate EGUs under section 112 by imposing Maximum Achievable Control Technology (MACT) standards.⁴⁷ The second option was an about-face, proposing a complete reversal of the appropriate and necessary finding made during the Clinton Administration, thereby removing EGUs from the HAP source list and regulating HAP emissions under the less stringent standards of section 111.⁴⁸

The EPA sought comment from the public and ultimately decided to go with the latter option, announcing in March 2005, that it was removing EGUs from the HAP source list and regulating mercury emissions under section 111.⁴⁹ To justify its delisting decision, the EPA relied on its interpretation of section 112(n)(1)—a section

42. See 42 U.S.C. § 7412(n)(1)(A) (2006) (specifying requirements for adding EGUs to HAP source-list).

43. See generally Regulatory Finding on the Emissions of Hazardous Air Pollutants, 65 Fed. Reg. 79,825 (adding coal- and oil-fired EGUs to HAP source list).

44. *Id.* (announcing section 112 regulatory program for coal- and oil-fired EGUs).

45. See 42 U.S.C. § 7412(e)(4) (limiting judicial review only to regulations limiting HAP emissions, not addition to list of HAP sources). Adding EGUs to the list of HAP sources did not constitute a final agency action subject to judicial review. *Id.* As such, a challenge to this determination would have to come once the regulations had been promulgated. *Id.*

46. See generally Proposed National Emissions Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4652 (Jan. 30, 2004) (proposing two regulatory alternatives for regulating HAP emissions from coal- and oil-fired EGUs).

47. See *id.* at 4662-64 (summarizing section 112 maximum achievable control technology rule for EGUs).

48. See *id.* at 4689-91 (proposing performance standards and emission guidelines for EGU mercury emissions).

49. See Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the

setting out procedures for adding EGUs to the HAP source list—stating that it had the authority to reverse its 2000 decision by making a “negative appropriate and necessary finding.”⁵⁰

The EPA also interpreted section 112(c)(9)—the section concerning how source categories can be removed from the source list—as inapplicable to EGUs, because adding EGUs to the HAP source list did not constitute a final agency action.⁵¹ Further, the EPA claimed that the statutory criteria had not been met at the time the listing decision was made.⁵² Accordingly, having concluded that it had the authority to bypass the delisting procedures in section 112(c)(9), the EPA determined that the delisting was justified because regulating EGUs was neither “appropriate” nor “necessary.”⁵³ Accordingly, the EPA promulgated the Clean Air Mercury Rule (CAMR), which implemented plant-specific “standards of performance” for mercury emissions for new coal-fired EGUs and supplemented a national cap on mercury emissions with a voluntary cap-and-trade program.⁵⁴

Section 112(c) List, 70 Fed. Reg. 15,994 (Mar. 29, 2005) (revising December 2000 “appropriate and necessary” finding).

50. *Id.* at 16,032 (making “negative appropriate and necessary” determination). Section 112(n)(1)(A) provides that “[t]he Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of [HAPs] . . . [and] shall regulate [EGUs] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study” 42 U.S.C. § 7412(n)(1)(A) (setting requirements for regulating EGUs under section 112).

51. *See* Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants, 70 Fed. Reg. at 16,033 (determining section 112(c)(9) delisting criteria is inapplicable in instances of errors in original determination or upon considering new information).

52. *See id.* (finding section 112(c)(9) delisting criteria inapplicable to listing decisions not made in compliance with CAA provisions). Section 112(c)(9) provides:

The Administrator may delete any source category from the [HAP source] list . . . whenever the Administrator . . . [determines] that emissions from no source category or subcategory concerned exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.

42 U.S.C. § 7412(c)(9)(B)(ii) (setting requirements for removing source categories from HAP source-list).

53. *See* Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants, 70 Fed. Reg. at 16,032-33 (finding regulating EGUs under section 112 is neither appropriate nor necessary).

54. *See generally* Emission Guidelines and Compliance Times for Coal-Fired Electric Utility Steam Generating Units Hg Trading Program General Provisions, 40 C.F.R. pt. 60.4101-4176 (2008) (setting standards of performance for mercury emissions and initiating cap-and-trade program for mercury emissions).

Several states and environmental groups brought suit against the EPA in the D.C. Circuit Court of Appeals challenging the validity of the EPA's actions of delisting EGUs from the HAP source list and implementing the CAMR.⁵⁵ The petitioners alleged that the EPA had no authority to delist EGUs from the HAP source list without taking the steps required by section 112(c)(9).⁵⁶ The court agreed, holding that the delisting was invalid, and vacated both rules accordingly.⁵⁷ The court then remanded CAMR's performance standards to the EPA for reconsideration.⁵⁸ After an appeal by the Utility Air Regulatory Group, an intervenor in the case, the Supreme Court denied certiorari, allowing the D.C. Circuit's opinion to stand.⁵⁹

III. BACKGROUND

A. Origins of the Clean Air Act

In 1970, Congress added section 112 to the CAA.⁶⁰ The original section gave the EPA ninety days to list HAPs that are "likely to cause an increase in death or serious illness."⁶¹ Within one year after listing these pollutants, the EPA was to propose regulations, provide notice of a public hearing on those regulations, and promulgate regulations governing the emissions of HAPs.⁶²

Over the course of the following eighteen years, the EPA listed only eight pollutants and promulgated regulations for seven, including mercury.⁶³ Of those seven HAPs, the EPA regulated only a

55. See *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (listing petitioners). The governmental petitioners consisted of fifteen states, the Michigan Department of Environmental Quality, Pennsylvania Department of Environmental Protection and the City of Baltimore. *Id.*

56. See *id.* (describing petitioners' contentions).

57. See *id.* at 583-84 (vacating Delisting Rule and CAMR).

58. See *id.* (ordering EPA to reconsider CAMR).

59. See *Util. Air Reg. Group v. New Jersey*, 129 S. Ct. 1308 (2009) (denying certiorari).

60. See Clean Air Act, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685 (1955) (amended 1970) (striking out section 107, redesignating sections 108-11 as sections 115-18, and adding sections 107-14 to CAA) [hereinafter 1970 Amendments].

61. *Id.* (requiring EPA to identify and list hazardous air pollutants).

62. See *id.* (allowing 180 days to list pollutants, thirty days to provide public hearing, and 180 days to promulgate regulations). The emission standards were to be set at "the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health from such hazardous pollutant." *Id.*

63. S. REP. NO. 101-228, at 131 (1989) (discussing reasons for amending CAA). The EPA listed mercury, beryllium, asbestos, vinyl chloride, benzene, radionuclides, inorganic arsenic, and coke oven emissions. *Id.* The EPA had not promulgated emission standards for coke oven emissions. *Id.* (expressing concern with slow pace of EPA's listing HAPs).

few of the source categories.⁶⁴ Because of the EPA's slow pace in regulating harmful emissions, Congress ultimately determined that "[t]he law ha[d] worked poorly" and recognized the need for a new regulatory scheme.⁶⁵

B. Enter 1990 Amendments

Frustrated with the EPA's seeming unwillingness to issue regulations, Congress passed the 1990 Amendments.⁶⁶ These amendments removed much of the EPA's discretion in regulating HAPs.⁶⁷ The 1990 Amendments named nearly 200 HAPs, including mercury, and mandated that they all be regulated by the EPA.⁶⁸ The 1990 Amendments also required the EPA to list "all categories and subcategories of major sources and area sources" that emit one or more HAPs.⁶⁹

64. *See id.* (expressing discontent with enforcement of CAA provisions to date). The Senate Report singles out power plant emissions of mercury as an example of the light regulation of HAPs. *See id.* One reason that the EPA had been so reluctant to impose regulations was the statutory language employed in the original version of section 112. *Id.* at 128. Providing "an ample margin of safety to protect public health" had been initially interpreted as meaning zero exposure to carcinogenic materials. *Id.* The EPA was not willing to issue such severe regulations, as "they would shutdown [sic] major segments of American industry." *Id.* The 1990 Amendments to the CAA sought to restructure the statutory scheme so that HAPs could be more effectively regulated. *Id.* (discussing intended effects of 1990 Amendments).

65. *See id.* at 128 (expressing concern with enforcement of CAA provisions prior to enacting 1990 Amendments). The Senate Report also points to a 1987 case out of the D.C. Circuit criticizing the EPA for its methodology in promulgating regulations. *See generally* Natural Res. Def. Council, Inc. v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) [hereinafter NRDC] (holding that EPA cannot use cost as factor in imposing emission regulations). In NRDC, pursuant to section 112 provisions, the EPA had proposed emission regulations for vinyl chloride. *Id.* at 1148. Given the potency of vinyl chloride, however, the EPA determined that issuing regulations that would provide "an ample margin of safety to protect public health" would require prohibiting vinyl chloride emissions at any level. *Id.* The EPA determined that requiring zero vinyl chloride emissions "could require closure of an entire industry," and abandoned these emission standards, imposing a set of less stringent (though still strict) best achievable control technology requirements. *Id.* at 1148-49. The court held that the EPA inappropriately considered cost when promulgating these emission standards, noting that section 112 requires only that the EPA consider the effects on human health, with cost only becoming a factor when considering the margin of safety. *Id.* at 1164. Accordingly, the court vacated the rule and ordered the EPA to reconsider its prior determination. *Id.* at 1166.

66. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 301, 104 Stat. 2399, 2531-74 (1990) (amending section 112 of CAA).

67. *See id.* (providing list of nearly 200 HAPs that *must* be regulated and providing specific listing and delisting procedures for regulating HAP sources).

68. *See id.* (mandating that EPA regulate nearly 200 specific HAPs).

69. *Id.* (requiring that list of HAP sources be compiled and those source categories regulated).

Once a source appears on this list, it is subject to strict pollution control requirements.⁷⁰ New sources must implement, at the very least, pollution control measures achieving the “maximum degree of reduction in emissions” as measured by “the emission control that is achieved in practice by the best controlled similar source.”⁷¹ Existing sources, once added to the list, must meet emissions standards that are at least as stringent as the “average emission[s] . . . achieved by the best performing 12 percent of the existing sources.”⁷²

In addition, Congress limited the EPA’s ability to intervene in regulating HAP sources.⁷³ In order to remove a HAP source from this list, the EPA must first determine that emissions from that source do not “exceed a level which is adequate to protect public health with an ample margin of safety” and that “no adverse environmental effect will result from any source.”⁷⁴ Congress also listed specific criteria for adding EGUs to the list of HAP sources.⁷⁵ The EPA was first required to perform a study analyzing the potential health hazards from HAP emissions from EGUs.⁷⁶ After reviewing this study, the EPA could add EGUs to the HAP source list upon a finding that it was appropriate and necessary to do so.⁷⁷

C. Promulgating the Clean Air Mercury Rule

In the waning days of the Clinton Administration, the EPA released a notice discussing its conclusions from the HAP Report on the potential hazards to public health that can reasonably be antici-

70. See 42 U.S.C. § 7412(d)(3) (2006) (setting pollution control requirements for HAP source categories).

71. *Id.* (setting guidelines for HAP emission regulations of new source categories).

72. 42 U.S.C. § 7412(d)(3)(A) (setting standards by which HAP emission regulations must be set for existing source categories). For categories or subcategories with less than thirty sources, the metric is the average emission levels of the five best performing sources instead of the best performing twelve percent. 42 U.S.C. § 7412(d)(3)(B).

73. See 42 U.S.C. § 7412(c)(9)(B)(ii) (limiting agency discretion in reversing prior listing determinations).

74. *Id.* (setting required findings that must be made before removing source category from section 112 list). Challenges to additions to this list may not be made until after the Administrator has promulgated emissions standards for the pollutant or source. 42 U.S.C. § 7412(e)(4) (limiting judicial review only after EPA promulgates regulations, not merely listing HAP sources).

75. See 42 U.S.C. § 7412(n)(1) (stating criteria for listing EGUs as HAP source category).

76. See 42 U.S.C. § 7412(n)(1)(A) (requiring that EPA Administrator conduct study on potential hazards to human health).

77. See *id.* (requiring that EPA Administrator determine that regulating EGUs is “appropriate” and “necessary” based on findings in required report).

pated from EGU emissions.⁷⁸ The HAP Report found a “plausible link” between industrial emissions of mercury and methylmercury levels in fish.⁷⁹ The EPA was especially concerned with the prospect of women of childbearing age eating contaminated fish, and the resultant poisoning of the fetus during gestation.⁸⁰ As a result, the EPA determined that it was appropriate and necessary to regulate mercury emissions from coal- and oil-fired EGUs.⁸¹

To facilitate regulating mercury emissions, one of President George W. Bush’s early proposals was the Clean Skies Initiative, which proposed extending cap-and-trade programs beyond sulfur dioxide emissions in order to cover power plant emissions of nitrogen oxide and mercury emissions.⁸² When the Clean Skies Act stalled in Congress, however, the President and the EPA sought to utilize their regulatory powers to promulgate a similar regulatory regime.⁸³ The EPA achieved that end by developing two rules: (1) the CAMR and (2) the Clean Air Interstate Rule (CAIR).⁸⁴

The EPA offered two alternative proposals for regulating mercury emissions from EGUs for public comment.⁸⁵ One proposal

78. See Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000) (releasing EPA findings regarding necessity of regulating HAP emissions by coal- and oil-fired EGUs).

79. See 1998 EPA HAP REPORT, *supra* note 14, at 7-43 (finding “plausible link” between industrial mercury emissions and methylmercury levels in fish).

80. See Regulatory Finding on the Emissions of Hazardous Air Pollutants, 65 Fed. Reg. at 79,827 (expressing concern over women of child bearing age ingesting contaminated fish).

81. See *id.* at 79,830 (finding it appropriate and necessary to regulate EGU emissions of mercury).

82. See President George W. Bush, Announcing Clear Skies and Global Climate Change Initiative, Address at Meeting of the Nat’l Oceanic and Atmospheric Assoc. (Feb. 14, 2002), available at <http://georgewbushwhitehouse.archives.gov/news/releases/2002/02/20020214-5.html> (announcing Clean Skies Initiative).

83. See Brian H. Potts, *Trading Grandfathered Air—A New, Simpler Approach*, 31 HARV. ENVTL. L. REV. 115, 127 (2007) (discussing motive behind promulgating Clean Air Mercury Rule and Clean Air Interstate Rule).

84. See *id.* (discussing EPA and White House efforts to promulgate regulatory regime similar to Clean Skies Initiative); see also Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (promulgating Clean Air Interstate Rule); Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2006) (promulgating Clean Air Mercury Rule).

85. See generally Proposed National Emissions Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4652 (Jan. 30, 2004) (proposing regulating mercury emissions from EGUs under either section 112 or 111). Notice and comment periods are required before promulgating emission standards or standards of performance. 42 U.S.C.

would have followed the Clinton EPA determination by maintaining the appropriate and necessary finding, setting MACT emission standards for mercury emissions from EGUs, and regulating these emissions under section 112 of the CAA.⁸⁶ The other proposal was the CAMR, which would negate the Clinton-EPA appropriate and necessary finding and would set standards of performance for EGUs, while supplementing a national cap on mercury emissions with a cap-and-trade program—a section 111 regulatory program.⁸⁷ The EPA chose the latter option and adopted the CAMR.⁸⁸ A similar cap-and-trade approach was promulgated under the CAIR as well.⁸⁹ The EPA noted that reductions in mercury emissions would most likely result incidentally from the CAIR program.⁹⁰

D. Judicial Review of EPA's Interpretations of the Clean Air Act

Challenges to EPA interpretations of the CAA are reviewed under the deference standard articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.⁹¹ When determining whether to afford *Chevron* deference to an agency's interpretation of a statute, the court is faced with two tasks.⁹² First, the court must determine whether Congress's intent is clear from the plain reading of the statute.⁹³ If so, both the agency and the reviewing court must "give effect to the unambiguously expressed intent of Congress."⁹⁴ When a court finds that Congress's intent is clearly and unambiguously

§ 7607(d)(3) (2006) (setting requirements for promulgating emissions standards or standards of performance). The decision to add a source category to the section 112(c) list does not constitute a final agency action, and does not require public notice or comment. *See id.* (lacking any mention of applicability to determinations to add HAP source to source list).

86. *See generally* Proposed National Emissions Standards for Hazardous Air Pollutants, 69 Fed. Reg. 4652 (offering alternative proposals for regulating mercury emissions from EGUs).

87. *See generally id.* (proposing alternative regulatory programs for mercury emissions).

88. *See* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. at 28,606 (promulgating Clean Air Mercury Rule).

89. *See* Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 70 Fed. Reg. at 25,162 (promulgating Clean Air Interstate Rule).

90. *See id.* at 25,170 (anticipating reductions in mercury emissions through implementation of CAIR).

91. 467 U.S. 837 (1984); *see also New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (citing deference test for agency interpretation created in *Chevron*).

92. *See Chevron*, 467 U.S. at 842 (setting out deference standard for statutory interpretations by appropriate agency).

93. *See id.* (articulating deference standard for statutory interpretations made by administrative agencies).

94. *Id.* at 842-43 (discussing first prong of deference test).

stated, the inquiry ceases then and there.⁹⁵ Only if the statute does not speak to the issue at hand will the court move on to the second task: determining whether the agency's interpretation of the statute is reasonable.⁹⁶

IV. NARRATIVE ANALYSIS

In *New Jersey v. EPA*, a unanimous Court of Appeals for the District of Columbia Circuit vacated two final rules promulgated by the EPA governing mercury emissions from EGUs.⁹⁷ The first rule removed coal- and oil-fired EGUs from the list of HAP sources to be regulated under section 112 (Delisting Rule).⁹⁸ The court reviewed the issue of whether the delisting was done in accordance with the removal provisions in section 112(c)(9).⁹⁹ The second rule under review was the CAMR, which set new performance standards for coal- and oil-fired EGUs, set new mercury emission limits for states and certain tribal areas, and established a voluntary cap-and-trade system for new and existing coal-fired EGUs.¹⁰⁰ The EPA conceded that if the Delisting Rule was inappropriate, the CAMR must fail, as the Delisting Rule led to CAMR's adoption.¹⁰¹

In analyzing the propriety of the EPA's interpretation, the court used the familiar, two-pronged *Chevron* deference standard.¹⁰² Under this standard, the court first reviews the statutory language to determine whether or not Congress's intent is clear.¹⁰³ If the language is ambiguous (and *only* if the language is ambiguous), the court will then look to the reasonableness of the agency's interpretation.¹⁰⁴ Here, the court did not see the need to go beyond the first prong of the *Chevron* deference test, having agreed

95. See *id.* at 842 (noting effect of finding that Congress' intent is clear).

96. See *id.* at 843 (discussing under what circumstances courts will look to reasonableness of agency interpretation of statutory language).

97. See *New Jersey v. EPA*, 517 F.3d at 578 (vacating Delisting Rule and CAMR).

98. See generally Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15,994 (Mar. 29, 2005) (revising December 2000 "appropriate and necessary" determination).

99. See *New Jersey v. EPA*, 517 F.3d at 581-83 (reviewing EPA's delisting decision).

100. See *id.* at 577 (noting which regulations are under review).

101. See *id.* at 583 (observing CAMR must fall if Delisting Rule is vacated).

102. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (creating test to determine whether agency determination or interpretation should be afforded deference).

103. See *id.* at 842 (setting out first prong of deference standard).

104. See *id.* at 843 (setting out second prong of deference standard).

with the petitioners' contention that once the EPA determined that EGUs should be regulated under section 112, the EPA no longer retained authority to delist EGUs without following the delisting provisions set forth in section 112(c)(9).¹⁰⁵

A. Analyzing Congress' Intent: The Search For Ambiguity

The court looked at the plain language of section 112(c)(9):

The Administrator may delete *any* source category from the [section 112(c)(1)] list . . . whenever the Administrator . . . [determines] that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse effect will result from emissions from any source.¹⁰⁶

In analyzing the statutory text, the court was quick to point out that the delisting provisions apply to "*any* source category" from the section 112(c)(1) list.¹⁰⁷ Since there was no exception for EGUs under the delisting provisions, the court found that the EPA improperly removed EGUs from the source category list without making the required findings under section 112(c)(9).¹⁰⁸

The court rejected the EPA's argument that the statute is, in fact, ambiguous when looking at section 112(c)(9) in conjunction with section 112(n)(1).¹⁰⁹ The court was not convinced by this argument, stating that the EPA's strained interpretation was akin to "deploy[ing] the logic of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9)."¹¹⁰ The court pointed out that section 112(n)(1) concerns how the Administrator decides to list EGUs as a HAP source, but contains no provisions concerning the *delisting* of EGUs.¹¹¹ As such, the court determined

105. See *New Jersey v. EPA*, 517 F.3d at 582 (finding EPA had no authority to delist EGUs from HAP source list without going through section 112(c)(9) delisting provisions).

106. 42 U.S.C. § 7412(c)(9) (2006) (articulating circumstances under which Administrator may remove source categories from HAP source list).

107. *New Jersey v. EPA*, 517 F.3d at 582 (finding language in section 112(c)(9) applies equally to EGUs and other HAP source categories).

108. See *id.* (finding that EPA acted improperly in removing EGUs from HAP source list).

109. See *id.* (rejecting EPA's contentions that section 112's plain language is ambiguous).

110. *Id.* (finding that Congress' intent is clear through section 112(c)(9)).

111. See *id.* at 582 (discussing lack of procedure for delisting EGUs). The court was also quick to note that while EGUs had been exempted from some of the section 112 provisions, those exemptions were narrow and explicitly stated. *Id.*

that the provisions of section 112(c)(9) were clear, and that it was bound by the first step of *Chevron* analysis.¹¹²

B. Analyzing the EPA's "Inherent Authority" Claim

The court also rejected the EPA's contention that, under the "fundamental principle of administrative law[,] an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so."¹¹³ The court agreed that, generally, agencies do have this "inherent authority," but countered this by noting that Congress has the power to limit an agency's discretion to reverse itself.¹¹⁴ Section 112(c)(9) was an exercise of that very power, limiting the EPA's discretion to remove *any* source from the list of HAP sources, thereby precluding the EPA's "inherent authority" claim.¹¹⁵

C. Statutory Requirements Regarding a Previous Delisting

The court rejected the EPA's final claim that because they had previously delisted HAP sources without following the provisions of 112(c)(9), the agency was not required to follow those provisions.¹¹⁶ The court responded that "previous statutory violations cannot excuse the one now before the court."¹¹⁷

In view of the plain language of section 112, the court never moved beyond step one of *Chevron*, and vacated the Delisting Rule as contrary to the plain language of the CAA.¹¹⁸ Vacating the Delisting Rule also required vacating the CAMR's regulations for

(determining that Congress's intent is clear through CAA's plain language). "For example, section 112(c)(6) expressly exempts EGUs from the strict deadlines imposed on other sources of certain pollutants." *Id.* (looking to other statutory provisions in finding Congress' intent to be clear).

112. *See New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (declining to move on to second prong of *Chevron* analysis).

113. *Id.* (rejecting EPA's "inherent authority" claim).

114. *See id.* at 583 (discussing Congress' power to limit EPA's discretion).

115. *Id.* at 583 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)) (finding that Congress intended to limit Administrator's discretion in removing source categories from HAP source list). "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Id.* The court also pointed out the repercussions of this interpretation. *See id.* Accepting the EPA's "inherent authority" claim would invalidate 112(c)(9) altogether, not just with respect to delisting EGUs, as the EPA "is unable to explain how . . . it would not also have the authority to remove any other source by ignoring the statutory delisting process." *New Jersey v. EPA*, 517 F.3d at 583 (discussing implications of EPA's argument).

116. *See New Jersey v. EPA*, 517 F.3d at 583 (rejecting EPA's argument).

117. *Id.* (holding EPA to CAA's plain language).

118. *See id.* (vacating Delisting Rule).

EGUs.¹¹⁹ The CAMR regulations were promulgated under section 111(d), and “under the EPA’s own interpretation of the section, [it] cannot be used to regulate sources listed under section 112.”¹²⁰ Accordingly, the court vacated both rules and remanded the issues to the EPA for reconsideration.¹²¹

V. CRITICAL ANALYSIS

The D.C. Circuit’s opinion in *New Jersey v. EPA* can best be described as an appropriate application of relevant law with a discussion that could have better articulated certain assumptions the court operated under.¹²² The court appropriately applied the law and reached the correct result, but could have made its discussion of applicable law clearer.¹²³ Since the court does not go beyond step one of the *Chevron* test, the only question is whether the court correctly determined that the CAA provisions are unambiguous.¹²⁴ Here, the court accurately applied the *Chevron* test, stopping after the first step and finding no need to move onto step two as the statutory language—and through it, Congress’s intent—is clear.¹²⁵

In its petition for certiorari to the Supreme Court, the Utility Air Regulatory Group (UARG) urged, however, that the court did not fully analyze the validity of the Delisting Rule and CAMR.¹²⁶ While there is some weight to this argument, and the court could have made explicit findings where it instead took certain facts as given, the concerns that UARG expresses are countered by the plain language of the CAA and, appropriately, the court opinion itself.¹²⁷

119. *See id.* (discussing implications of vacating Delisting Rule).

120. *Id.* (vacating CAMR).

121. *New Jersey v. EPA*, 517 F.3d at 583-84 (vacating Delisting Rule and CAMR).

122. For a narrative of the court’s opinion, see *supra* notes 97-121 and accompanying text.

123. For a discussion of the scope of the court’s opinion, see *infra* notes 126-69.

124. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (stating that interpretation’s reasonableness is only to be examined upon finding that applicable statute’s language is ambiguous).

125. *See New Jersey v. EPA*, 517 F.3d at 582 (determining that there is no need to move on to step two of *Chevron* deference test).

126. *See* Petition for Writ of Certiorari, at *14-16, *Util. Air Regulatory Group v. New Jersey*, No. 08-352, 2008 WL 4294884 (2008) (seeking review of D.C. Circuit’s opinion).

127. For a discussion of the court’s treatment of UARG’s claim, see *infra* notes 128-69 and accompanying text.

The court's opinion presupposes that the 2000 appropriate and necessary determination was itself lawful—a notion that UARG urges is not the case.¹²⁸ The court's presupposition, however, is correct.¹²⁹ Before regulating HAP emissions from EGUs, Congress wanted the EPA to be sure that EGUs needed to be regulated in the first place.¹³⁰ In order to ensure that the EPA has a sound basis for regulating HAP emissions from EGUs, section 112(n)(1)(A) imposes two requirements that the EPA must meet before regulating EGU emissions: the EPA Administrator must (1) undertake a study looking into the potential hazards to public health from EGU emissions of HAPs; and (2) make a finding that it is appropriate and necessary to regulate these emissions.¹³¹

While section 307(d) of the CAA does impose a notice and comment period requirement on emission standards, it makes clear that the section is only applicable to final agency action promulgating regulations on HAP emissions.¹³² Section 112(e)(4), however, clearly states that the decision to add a HAP source onto the 112(c) list is not a final agency action subject to judicial review.¹³³ If these two sections are read in conjunction with one another, it is undeniable that no notice or comment period was necessary to add EGUs to the section 112(c) list.¹³⁴

The 2000 appropriate and necessary determination was made in accordance with these statutory provisions.¹³⁵ Pursuant to sec-

128. See Petition for Certiorari, *supra* note 126 (urging that 2000 appropriate and necessary determination was unlawful). "The D.C. Circuit erred in ignoring CAA § 112(n)'s threshold requirements and focusing exclusively on another provision of the statute [section 112(c)(9)] to require, under the guise of a *Chevron* step one analysis, future EPA Administrators to proceed with *unlawful* rulemaking." *Id.* at *4.

129. For a discussion of why the court's presupposition is correct, see *infra* notes 130-43.

130. See 42 U.S.C. § 7412(n)(1)(A) (2006) (requiring EPA Administrator to determine whether regulating HAP emissions from EGUs is "appropriate and necessary").

131. See *id.* (setting out requirements that Administrator must satisfy in order to regulate HAP emissions from EGUs).

132. See 42 U.S.C. § 7607(d)(3) (2006) (imposing requirements for notice and comment period before promulgating rules, regulations and emission standards).

133. See 42 U.S.C. § 7412(e)(4) (2006) (suspending judicial review until emission standards are promulgated).

134. See *id.* (removing additions to section 112(c) list from specter of judicial review); 42 U.S.C. § 7607(d)(3) (imposing notice and comment period requirements only when promulgating final rules and regulations).

135. See generally Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000) (outlining statutory authority and policy reasons for adding EGUs to section 112(c) list of HAP sources).

tion 112(n)(1)(A), the EPA conducted a study of the potential health effects of HAP emissions from EGUs.¹³⁶ The EPA then evaluated the findings, ultimately concluding that mercury is the HAP of greatest concern.¹³⁷ The EPA found that roughly sixty percent of mercury emissions came from anthropogenic sources, with thirty percent of those emissions coming from EGUs, posing a public health threat and environmental danger.¹³⁸ On account of this finding, the Administrator found that “regulation of HAP emissions from coal- and oil-fired electric utility steam generating units under section 112 [of the CAA] is appropriate and necessary.”¹³⁹ Accordingly, coal- and oil-fired EGUs were added to the list of HAP sources under section 112(c).¹⁴⁰ The addition was made official by publication in the Federal Register fourteen months later.¹⁴¹ The required study had been conducted, and the required finding had been made.¹⁴² Though the court should have made a stronger effort to articulate the presumption that the 2000 determination was valid, the presupposition was correct and was an appropriate premise to work from.¹⁴³

Building off of this premise, the court utilized the *Chevron* deference standard to determine whether the EPA’s delisting was appropriate.¹⁴⁴ The court made it only through the first prong of the *Chevron* test, ultimately finding that section 112(c)(9)’s plain language was unambiguous and Congress’ intent clear.¹⁴⁵ The court’s

136. See 1998 EPA HAP REPORT, *supra* note 14 (discussing health effects of HAPs emitted by EGUs).

137. Regulatory Finding on the Emissions of Hazardous Air Pollutants, 65 Fed. Reg. at 79,827 (expressing concern over health effects of mercury exposure). The EPA looked at multipathway exposure for six HAPs: mercury, radionuclides, arsenic, cadmium, lead and dioxins. Of these, the EPA determined that mercury posed the greatest health concern, as it is “highly toxic, persistent, and bioaccumulates in food chains.” *Id.*

138. See *id.* (discussing findings justifying regulating HAP emissions from EGUs).

139. *Id.* at 79,830 (finding that regulating HAP emissions from EGUs is appropriate and necessary).

140. *Id.* (determining that EGUs should be added to HAP source list).

141. See generally National Emissions Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6521 (Feb. 12, 2002) (revising section 112(c) HAP source category list).

142. See generally Regulatory Finding on the Emissions of Hazardous Air Pollutants, 65 Fed. Reg. at 79,825 (discussing study of HAP emissions from EGUs and finding that regulation is appropriate and necessary).

143. See *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (making no explicit finding that 2000 determination was valid).

144. See *id.* at 581 (applying *Chevron* deference standard).

145. See *id.* at 582 (finding it unnecessary to go beyond first prong of *Chevron* deference test).

reasoning on this matter centered on three words: “any source category.”¹⁴⁶ These three words were vital to the court reaching its correct conclusion that the Delisting Rule was inappropriately undertaken.¹⁴⁷ While an entire judicial opinion resting on just three words in a statute thousands of words long may seem like interpretation by piecemeal, the court actually addressed all of the appropriate provisions and properly applied the *Chevron* deference test.¹⁴⁸

The court appropriately interpreted statutory provisions that the EPA and *amici* urged were in conflict with one another—sections 112(c)(9) and 112(n)(1)(A).¹⁴⁹ The court correctly noted that the provisions in section 112(n)(1)(A) applied only to *adding* EGUs to the list, and was completely devoid of any provisions applicable to *removing* EGUs from the section 112(c) list.¹⁵⁰ In light of the limited application of section 112(n)(1)(A), the court properly determined that removing EGUs from the HAP source list would be subject to the fallback provisions of section 112(c)(9); “any source category” must apply to EGUs just as it would to all other source categories.¹⁵¹ In declining to read ambiguity into the statute, the court followed Congress’s intent, as evidenced by the statutory language, and correctly applied the *Chevron* standard, appropriately binding the EPA to the statute’s plain language.¹⁵²

The court also correctly rejected the EPA’s claim that it possesses the authority to reverse its own prior determinations under the “fundamental principle of administrative law that an agency has inherent authority to reverse an earlier administrative determina-

146. See *generally id.* (quoting 42 U.S.C. § 7412(c)(9)) (construing “any source category” to apply to EGUs).

147. See *generally id.* (relying on term “any source category” to reach determination that EPA violated CAA provisions in promulgating CAMR).

148. See Petition for Certiorari, *supra* note 126, at 23 (appealing circuit court decision to United States Supreme Court).

In this case the court’s gaze never deviated from three words—“any source category”—as the basis for its holding . . . Had the court read CAA § 112 ‘as a whole,’ it could not have concluded that . . . the Agency was nevertheless precluded from removing EGUs from the CAA § 112 source list.

Petition for Certiorari, *supra* note 126, at 23.

149. See *New Jersey v. EPA*, 517 F.3d at 582 (rejecting EPA’s argument that sections 112(c)(9) and 112(n)(1)(A) were in conflict).

150. See *id.* (analyzing section 112(n)(1)(A)’s applicability to removing EGUs from section 112(c) source list).

151. See *id.* (finding EPA is unable to point to any persuasive reason why section 112(c)(9) is ambiguous when applying to removing EGUs from HAP source list).

152. See *id.* (holding EPA to statutory provisions of section 112(c)(9)).

tion.”¹⁵³ Normally, administrative agencies possess this power.¹⁵⁴ At the same time, however, Congress has inherent authority to limit an agency’s discretion as Congress sees fit.¹⁵⁵ Perhaps seeing the potential for this sort of conflict—two different Administrations having two different views on how appropriate certain environmental regulations may be—Congress intentionally limited the EPA’s discretion to remove HAP sources from the list without first making specific determinations.¹⁵⁶

As the court points out, allowing this claim to succeed would effectively nullify section 112(c)(9) in its entirety.¹⁵⁷ A finding that the agency’s “inherent authority” overrides congressional mandate would allow the EPA to remove any HAP source from the source list without making any finding whatsoever.¹⁵⁸ The EPA would be able to remove a source on a mere whim.¹⁵⁹

An interesting issue left open by the court’s opinion relates to UARG’s contention that the 2000 determination was invalid: to what degree the section 112(c)(9) removal provisions apply to EPA determinations that did not meet statutory requirements for *addition* to the HAP source list.¹⁶⁰ The court declined to answer this question.¹⁶¹ The issue, therefore, remains unresolved.¹⁶²

153. *Id.* (quoting Brief of Respondent at 22 (internal quotation marks omitted)).

154. *See New Jersey v. EPA*, 517 F.3d at 583-84 (agreeing administrative agencies typically have authority to reverse themselves).

155. *See id.* (discussing Congress’s power to limit agency discretion).

156. *See* 42 U.S.C. § 7412(c)(9) (2006) (requiring EPA to make finding that no source in category emits HAPs above level adequate to protect public health with ample margin of safety before removing source from HAP source list).

157. *See New Jersey v. EPA*, 517 F.3d at 583 (considering ramifications of EPA’s “inherent authority” claim).

158. *See id.* (rejecting EPA’s “inherent authority” claim).

159. *See id.* (rejecting EPA’s “inherent authority” claim).

160. *See* Petition for Certiorari, *supra* note 126, at *24 (urging EGUs may be removed from HAP source list without meeting section 112(c)(9) requirements because addition to the list was never in accordance with requirements set forth under section 112(n)(1)(A)).

161. *New Jersey v. EPA*, 517 F.3d at 584 (declining to review other contentions of parties to suit). “[T]he court does not reach other contentions of petitioners or intervenors.” *Id.*

162. *See id.* (declining to entertain intervenors’ contentions relating to underlying validity of EGU’s addition to HAP source list). This issue raises the question of whether mere presence on the list is sufficient to trigger section 112(c)(9) removal provisions, or if the underlying rationale for the source being added to the list in the first place is relevant to the inquiry. *See* Petition for Certiorari, *supra* note 126, at *25 (urging that because regulating EGUs was not deemed appropriate and necessary pursuant to statutory mandate EGUs may be delisted without making required 112(c)(9) finding). For example, under section 112(n)(4)(B), in order to add oil and gas wells to the HAP source list, the Administrator must limit the

Prior to this case, the EPA made the required finding that regulating mercury emissions is “appropriate and necessary.”¹⁶³ The court did not look to the underlying validity of the 2000 determination that it was “appropriate and necessary” to add EGUs to the HAP source list.¹⁶⁴ It would seem anomalous to hold the EPA to strict adherence to the removal provisions without holding it to equally strict adherence to the addition provisions.¹⁶⁵ This seems to be a point that the court, quite simply, missed.¹⁶⁶ In this case, however, the point was moot, as adding EGUs to the HAP source list requires less procedural determinations by the EPA than removing those same substances.¹⁶⁷ The question, however, remains open and illustrates why the initial inquiry into the validity of additions to the HAP source list is an important step in determining whether the removal provisions apply in any particular instance.¹⁶⁸ The court would have been well served to make this initial inquiry and resolve the question.¹⁶⁹

emission standards to areas with more than one million people, and must determine that HAP emissions from these wells “present more than a negligible risk of adverse effects to public health.” 42 U.S.C. § 7412(n)(4)(B) (2006) (limiting EPA’s authority to add oil and gas wells to HAP source list). If the EPA fails to make the finding that the wells present a greater than negligible risk of harm to public health, is the agency still bound by the section 112(c)(9) removal provisions? What if the EPA requires that emissions standards be met in an area with only 800,000 people? Taking the court’s opinion on its face, it would seem that the section 112(c)(9) removal provisions would still apply; the mere presence on the HAP source list is sufficient to trigger the removal requirements. *See generally New Jersey v. EPA*, 517 F.3d 574 (making no inquiry into validity of determination to add EGUs to HAP source list). That initial inquiry into the validity of the addition was never made, so the question remains open. *See generally id.* (making no inquiry into underlying validity of determination to add EGUs to HAP source list). The removal provisions, therefore, seem to apply.

163. *See supra* notes 128-43 and accompanying text (noting EPA’s compliance with section 112(n)(1)(A) in determining regulating mercury emissions from EGUs is “appropriate and necessary”).

164. *See generally New Jersey v. EPA*, 517 F.3d 574 (making no inquiry into validity of determination to add EGUs to HAP source list).

165. *See, e.g.*, 42 U.S.C. §§ 7412(c)(9), 7412(n)(1)(A), 7412(n)(4)(B) (setting removal and addition criteria for HAP source list).

166. *See generally New Jersey v. EPA*, 517 F.3d 574 (operating under assumption that underlying appropriate and necessary determination was valid).

167. *See supra* notes 128-43 and accompanying text (concluding EPA made required statutory findings in determining regulating mercury emissions from EGUs is “appropriate and necessary”).

168. *See* Petition for Certiorari, *supra* note 126, at *25 (questioning whether section 112(c)(9) removal provisions apply to additions that failed to meet their statutory requirements).

169. *See id.* (discussing application of delisting provisions to source categories that did not go through required findings before being added to HAP source list).

VI. IMPACT

This case is not interesting because it charts new legal waters; the applicable law is relatively straightforward.¹⁷⁰ This case is not even interesting because the court uses Lewis Carroll to describe the EPA's interpretation; the D.C. Circuit has done this before.¹⁷¹ Rather, this case is interesting because of the practical implications of regulating HAP emissions.¹⁷² As a result of this decision, new power plants will be subject to the more stringent MACT emission standards, as opposed to the more lenient cap-and-trade regulations under the CAMR.¹⁷³ The decision also opens the door to applying this MACT regulatory regime to pollutants not yet on the section 112(b) list of HAPs, notably CO₂.¹⁷⁴

A. The Future of Mercury Regulations

Since the Supreme Court has denied certiorari for this case,¹⁷⁵ there is not much uncertainty as to what will ultimately happen with mercury regulations as a result of the D.C. Circuit's holding in *New Jersey v. EPA*; the regulations will become stricter.¹⁷⁶ In order to remove EGUs from the source list, the EPA would have to follow

170. For a discussion of the applicable law, see *supra* notes 60-96, 128-69 and accompanying text.

171. See *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007) (rejecting EPA's interpretation of section 111(a)(4) of CAA). "Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view." *Id.* *New Jersey v. EPA* is just one in a long string of cases where the D.C. Circuit has spoken with one common theme: read the statute. See, e.g., *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008) (vacating rule preventing state and local authorities from supplementing inadequate monitoring requirements for certain stationary pollution sources); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (vacating Clean Air Interstate Rule); *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007) (vacating emissions standards for brick and ceramics kilns); *New York v. EPA*, 443 F.3d 880 (vacating Equipment Replacement Provisions).

172. For a discussion of the practical implications of regulating HAP emissions, see *infra* notes 175-223.

173. See *Mercury: NRDC's Walke Discusses Impact of Court Decision Rejecting EPA Emissions Regulation*, E&ETV, (Mar. 5, 2008) (discussing impact on new power plants), available at <http://www.eenews.net/tv/transcript/762>.

174. See Daniel Brian, *Regulating Carbon Dioxide Under the Clean Air Act as a Hazardous Air Pollutant*, 33 COLUM. J. ENVTL. L. 369, 382-83 (2008) (noting that *New Jersey v. EPA* decision does not bar EPA from regulating CO₂ emissions by EGUs under section 112).

175. See *Util. Air Reg. Group v. New Jersey*, 129 S. Ct. 1308 (2009) (denying petition for certiorari), *cert. dismissed*, 129 S. Ct. 1313 (2009).

176. See CRS, CASE REPORT, *supra* note 25, at 4 (discussing implications of *New Jersey v. EPA* on future mercury regulations).

the removal provisions in section 112(c)(9).¹⁷⁷ These provisions are very restrictive, requiring that the EPA find that HAP emissions from EGUs do not “exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from [EGU] emissions.”¹⁷⁸ This finding, however, would be almost impossible to make, as EGUs emit roughly forty-eight tons of mercury annually.¹⁷⁹

The Supreme Court’s denial of certiorari has cleared the road for the EPA to develop new mercury regulations for coal- and oil-fired EGUs.¹⁸⁰ In accordance with the D.C. Circuit’s opinion, the EPA will have to regulate EGU emissions of mercury under section 112, which requires that MACT standards be implemented.¹⁸¹ In 2004, the EPA had proposed MACT standards alongside the cap-and-trade system that would ultimately be the CAMR.¹⁸² The EPA, however, did not promulgate these MACT regulations, and opted to implement CAMR instead.¹⁸³

The problem with these standards, however, is that significant advances have been made in the technology available to reduce EGU mercury emissions in the five years that have passed since they were drafted.¹⁸⁴ The EPA, therefore, will have to promulgate new

177. See 42 U.S.C. 7412(c)(9) (2006) (containing removal provisions for HAP source categories).

178. *Id.* (setting forth requirements for removing HAP sources from section 112 list).

179. See LARRY PARKER & JOHN BLODGETT, CONG. RES. SERV., ORD. NO. RL34018, AIR QUALITY: MULTI-POLLUTANT LEGISLATION IN THE 110TH CONGRESS 1 (2008) [hereinafter CRS, MULTI-POLLUTANT LEGISLATION], available at <http://ncse-online.org/NLE/CRSreports/08Mar/RL34018.pdf> (discussing EGU emissions of pollutants). “Electric utility generating facilities are a major source of air pollution . . . includ[ing] several pollutants that directly pose risks to human health and welfare, [such as] mercury.” *Id.*

180. See Dean, *supra* note 36, at A16 (reporting on Supreme Court’s denial of certiorari); Editorial, *Clean Slate on Clean Air*, N.Y. TIMES, Mar. 8, 2009, at WK9 (urging Obama Administration to develop robust emissions standards for mercury and fine particulates).

181. See 42 U.S.C. § 7412(d)(2) (requiring maximum achievable reduction standards for new and existing HAP sources).

182. See Proposed National Emissions Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4652 (Jan. 30, 2004) (putting forth alternative proposals for regulating EGU emissions of mercury).

183. See generally Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List, 70 Fed. Reg. 15,994 (Mar. 29, 2005) (adopting CAMR).

184. See CRS, CASE REPORT, *supra* note 25, at 4 (discussing implications of *New Jersey v. EPA* decision on new and existing EGUs).

MACT standards in order to be in compliance with section 112.¹⁸⁵ This process could end up taking as long as three years, as the EPA will need to compile information on the effectiveness of available emission reduction technology.¹⁸⁶

For the time being, new EGUs and modifications to existing EGUs will be subject to a provision of the CAA known as the "MACT hammer."¹⁸⁷ Under the MACT hammer, if no applicable HAP emission limits are set for a source category, there may not be construction of, or modification to, a major source in the category until the EPA or the delegated state agency has made an individualized determination that the particular unit will meet standards equivalent to or better than maximum achievable emission controls.¹⁸⁸

The MACT hammer would subject new and existing coal- and oil-fired EGUs to very strict pollution control requirements.¹⁸⁹ New sources would be required to implement pollution control procedures that achieve the "maximum degree of reduction in emissions," as determined by the "best controlled similar source" in practice.¹⁹⁰ Existing coal- and oil-fired EGUs would not be required to meet the same levels as new EGUs, but would still be sub-

185. See 42 U.S.C. § 7412(d)(2) (requiring any HAP emission standards be tailored to achieve maximum degree of reduction in HAP emissions from new and existing HAP sources).

186. See CRS, CASE REPORT, *supra* note 25, at 5 (analyzing current state and future direction of EGU mercury emission standards). Several bills in Congress might help speed this process along. In 2007, five multi-pollutant bills were introduced in Congress, each of which would regulate CO₂, SO₂, NO_x, and mercury emissions, seeking a ninety percent reduction in mercury reductions by various deadlines ranging from 2011-2015. See Clean Air/Climate Change Act of 2007, S. 1168, 110th Cong. (2007); Clean Air Planning Act of 2007, S. 1177, 110th Cong. (2007); Clean Power Act of 2007, S. 1201, 110th Cong. (2007); Energy Independence, Clean Air, and Climate Security Act of 2007, S. 1554, 110th Cong. (2007); Healthy Air and Clean Water Act, H.R. 3989, 110th Cong. (2007). Less than one week after the *New Jersey v. EPA* decision was passed down, Senator Thomas Carper (D-DE) introduced a bill specifically targeting mercury emissions. See Mercury Emissions Control Act, S. 2643, 110th Cong. (2008). The bill would mandate that emission regulations for mercury be promulgated by October 1, 2008. *Id.* (seeking to expedite promulgation of mercury regulations).

187. See CRS, CASE REPORT, *supra* note 25, at 5 (characterizing section 112(g)(2) as "MACT hammer"); see also 42 U.S.C. § 7412(g)(2) (setting requirements for HAP sources that appear on source list, but whose emission standards have not yet been promulgated).

188. See 42 U.S.C. § 7412(g)(2) (requiring Administrator or delegated state agency to make finding that new source will meet maximum achievable emission controls in cases where no applicable emission standards exist).

189. See *id.* (limiting circumstances under which new HAP source categories can be constructed or modified).

190. See 42 U.S.C. § 7412(d)(3) (setting standards by which HAP emissions must be regulated for new source categories).

ject to very stringent emission requirements in their own right.¹⁹¹ Existing coal- and oil-fired EGUs would be required to bring their mercury emissions below “the average emission [levels] . . . achieved by the best performing 12 percent of the existing sources.”¹⁹²

This is exactly the case with EGU emissions of mercury—as a result of the *New Jersey v. EPA* opinion, there are no emissions standards on the books for mercury.¹⁹³ Any newly built EGUs or modifications to existing EGUs will be subject to a case-by-case determination by the EPA or the delegated state agency to ensure that the new or modified EGU will meet maximum achievable emission standards.¹⁹⁴ More lawsuits seeking to enforce this provision can be expected.¹⁹⁵

191. See *id.* (noting that existing HAP source categories need not be subject to emission standards as stringent as new HAP source categories).

192. See *id.* For categories or subcategories with fewer than 30 sources, the metric is the average emission levels of the five best performing sources instead of the best performing twelve percent. *Id.* (setting standards by which HAP emission regulations must be set for existing source categories).

193. See CRS, CASE REPORT, *supra* note 25, at 5-6 (discussing application of MACT hammer on construction of new EGUs and modifications of existing EGUs). Some claimed that striking down the CAMR left the US without a national regulatory program to cut mercury emissions. See Felicity Barringer, *Appellate Panel Rejects E.P.A. Emissions Limits*, N.Y. TIMES, Feb. 9, 2008, at A13 (discussing facts of *New Jersey v. EPA* and reactions to decision). This was not entirely true, though. The Clean Air Interstate Rule (CAIR) imposed a multi-pollutant cap-and-trade aimed particularly at SO₂ and NO_x emissions. See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005) (promulgating CAIR). CAIR would reduce SO₂ and NO_x emissions from EGUs, and would have an incidental effect on mercury emissions as well. *Id.* at 25,170 (discussing incidental effects on mercury emissions). In fact, the first phase of mercury reductions provided for in the CAMR—a twenty-nine percent reduction in mercury emissions by EGUs by 2010—was to be achieved entirely from incidental mercury reductions under the CAIR cap-and-trade program. See Posting of John Walke to Natural Resource Defense Council Switchboard, http://switchboard.nrdc.org/blogs/jwalke/faq_about_the_court_decision_o.html (Feb. 10, 2008) (countering claims that vacatur of CAMR left EPA without national mercury emission regulatory scheme). CAIR was completely unaffected by the *New Jersey v. EPA* decision. *Id.* (discussing effect of *New Jersey v. EPA* decision on CAIR). The D.C. Circuit later vacated CAIR, then reversed itself, permitting CAIR to remain in effect until it is replaced with a valid regulation. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (vacating CAIR in its entirety), *rev'd in part*, 550 F.3d 1176 (D.C. Cir. 2008) (reversing decision to vacate CAIR and charging EPA with task of replacing CAIR with new rule).

194. See 42 U.S.C. § 7412(g)(2) (requiring Administrator or delegated state agency to make case by case determinations on whether maximum achievable control technology emissions limitations have been met for constructions of new HAP sources and modifications of existing HAP sources).

195. See *Sierra Club Threatens Suits over Coal Power Plants*, REUTERS, May 6, 2008, available at <http://www.reuters.com/article/environmentNews/idUSN0651739020080507> (discussing Sierra Club's threats to sue several energy companies in effort to enforce *New Jersey v. EPA* decision); see also Memorandum and Order, S. Alliance

B. A Springboard for Regulating New HAPs?

The D.C. Circuit's decision in *New Jersey v. EPA* may end up being an enormous gift for a future EPA Administrator who wishes to aggressively reduce emissions of HAPs not yet on the list, such as greenhouse gases like CO₂.¹⁹⁶ The court made clear that the section 112 list is *source-specific*, not *pollutant-specific*, and since EGUs remain listed on the section 112(c) list, this relatively short opinion may end up packing quite a punch for future regulation of other pollutants, including greenhouse gases.¹⁹⁷

What the court effectively did in this case is hold that once a HAP source category is on the source list, it stays on the source list until the EPA determines that the particular source category no longer emits HAPs at a level dangerous to public health or to the environment.¹⁹⁸ Essentially, the court banned regulating emissions from these source categories under section 111(d)—a ban that is *source-specific*, not *pollutant-specific*.¹⁹⁹

When viewed from this angle, the holding begs the question, "What are these HAP sources emitting that is not on the list of HAPs?" The bar is set very high for emission standards under section 112.²⁰⁰ The statutory requirements for setting emission standards provides a good foundation to set a regulatory regime aimed at pollutants not yet on the list of HAPs, but still emitted by HAP source categories.²⁰¹

Think CO₂. CO₂ is without question the most infamous greenhouse gas.²⁰² Recently, the Supreme Court held that the EPA has

for Energy v. Duke Energy Carolinas, LLC, No. 1:2008cv00318, (W.D.N.C. Dec. 2, 2008) (seeking to enjoin Duke Energy from constructing new coal-fired EGU without obtaining MACT determination).

196. See generally Brian, *supra* note 174 (advocating regulation of CO₂ as hazardous air pollutant under section 112 of CAA).

197. See *id.* at 382-83 (noting court's ban on regulating EGU HAP emissions under section 111(d) is source-, not pollutant-specific).

198. See *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (vacating CAMR). "[B]ecause section 112(c)(9) governs the removal of 'any source category' from the section 112(c)(1) list . . . the only way EPA could remove EGUs from the section 112(c)(1) list was by satisfying section 112(c)(9)'s requirements." *Id.*

199. See Brian, *supra* note 174, at 383 (discussing scope of *New Jersey v. EPA* holding).

200. See 42 U.S.C. § 7412(d)(2) (2006) (requiring that emission standards for HAP emissions be set to achieve maximum degree of emission reductions for source categories on section 112(c)(1) list).

201. Cf. 42 U.S.C. § 7412(b)(2) (setting forth provisions for periodic review and revision of HAP list).

202. See RICHARD B. ALLEY ET AL., A REPORT OF WORKING GROUP I OF THE INTERGOVERNMENTAL PANEL FOR CLIMATE CHANGE: SUMMARY FOR POLICYMAKERS 2

the authority to regulate greenhouse gas emissions from automobiles under the CAA.²⁰³ Though the Court's holding directly addressed only the EPA's authority to regulate greenhouse gases under section 202(a)(1) of the CAA, "the finding that carbon dioxide is an air pollutant would apply with respect to Clean Air Act provisions well beyond section 202(a)(1)."²⁰⁴ In fact, the finding seems to apply nicely to section 112(b), as that section gives the EPA broad discretion in deciding how the HAP list should change.²⁰⁵

There is a case to be made for regulating CO₂ as a HAP.²⁰⁶ Section 112 allows additions to be made on the basis of risk of environmental harm, and the evidence supporting environmental damage stemming from greenhouse gas emissions and resultant global warming continues to grow.²⁰⁷ Furthermore, if greenhouse gases were added to the HAP list, the MACT provisions in section 112 would allow the EPA to have an enormous effect on greenhouse gas emissions in one fell swoop.²⁰⁸ EGUs, for example, have emitted well over two billion metric tons of CO₂ annually between 2000 and 2005.²⁰⁹ If CO₂ were to be added to the HAP list, EGUs could be subject to MACT standards—a move that would significantly reduce CO₂ emissions.²¹⁰

(2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>, (noting rising concentrations of CO₂ and resultant effects on climate). The 2007 Intergovernmental Panel on Climate Change has even gone so far as to call CO₂ "the most important anthropogenic greenhouse gas." *Id.*

203. See *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that EPA has authority under CAA to regulate greenhouse gases).

204. Johnathan S. Martel, *Climate Change Law and Litigation in the Aftermath of Massachusetts v. EPA*, DAILY ENV'T REP., Vol. 7, No. 214, Nov. 6, 2007, at 3, reproduced at, http://www.arnoldporter.com/resources/documents/BNA-Article_Martel_1107.pdf (noting that *Massachusetts v. EPA* holding may apply to several sections other than section 202(a)(1) of CAA).

205. See 42 U.S.C. § 7412(b)(2) (granting Administrator authority to add or remove HAPs from list "where appropriate").

206. For a thorough discussion of the costs and benefits of regulating CO₂ as a HAP, see Brian, *supra* note 174, at 395-415 (weighing pros and cons for regulating CO₂ as HAP).

207. See *id.* at 398-403 (discussing adverse effects of ambient CO₂ concentrations and CO₂ depositions onto surface ocean waters).

208. See 42 U.S.C. § 7412(d)(2) (requiring maximum degree of emission reduction for HAP sources on source list).

209. See CRS, MULTI-POLLUTANT LEGISLATION, *supra* note 179, at 1 (providing chart with CO₂ emissions for 2000-05). Fossil-fuel EGUs emitted 2.429 billion metric tons of CO₂ in 2000, 2.389 billion metric tons in 2001, 2.395 billion metric tons in 2002, 2.415 billion metric tons in 2003, 2.456 billion metric tons in 2004, and 2.513 billion metric tons in 2005. *Id.*

210. See 42 U.S.C. § 7412(d) (requiring maximum degree of emission reduction for HAP sources on source list).

The new EPA Administrator, Lisa Jackson, seems to be moving in this direction in announcing a proposed national system for reporting greenhouse gas emissions, including CO₂ emissions, by major U.S. sources.²¹¹ These reporting requirements would apply to any facility that emits 25,000 metric tons or more of greenhouse gases annually.²¹² More than 13,000 facilities, spanning dozens of different energy-intensive industries (including coal- and oil-fired EGUs) would be required to report their emission levels of greenhouse gases.²¹³ These reporting obligations will provide the EPA with comprehensive and accurate information regarding greenhouse gas emissions across the country and across different sectors of the national economy.²¹⁴ The EPA has made clear that this data is essential to developing a comprehensive regulatory program for greenhouse gas emissions.²¹⁵

These reporting requirements seem like a logical first step in any move to add greenhouse gases to the list of HAPs.²¹⁶ The MACT provisions require that emission standards for new and existing HAP source categories be set according to the best performing sources.²¹⁷ In order to promulgate regulations relative to existing sources, they must know what these sources are emitting.²¹⁸ Should this new reporting requirement be promulgated, it is likely

211. See Press Release, Env'tl. Prot. Agency, , EPA Proposes First National Reporting on Greenhouse Gas Emissions (Mar. 10, 2009) (on file with author) (proposing national reporting obligations of greenhouse gas emissions produced by major U.S. sources).

212. See ENVTL. PROT. AGENCY, PROPOSED MANDATORY GREENHOUSE GAS REPORTING RULE: FACT SHEET 1, <http://www.epa.gov/climatechange/emissions/downloads/ProposedRule-FactSheet.pdf> [hereinafter EPA FACT SHEET] (outlining provisions of Proposed Mandatory Greenhouse Gas Reporting Rule).

213. See Press Release, Env'tl. Prot. Agency, EPA Proposes First Nat'l Reporting on Greenhouse Gas Emissions (Mar. 10, 2009) (on file with author) (discussing which facilities proposed rule will affect).

214. See *id.* (discussing necessity of accurate data for developing comprehensive regulatory program for greenhouse gas emissions); see also ENVTL. PROT. AGENCY, PROPOSED RULE: MANDATORY REPORTING OF GREENHOUSE GASES, ELECTRICITY GENERATION 1, <http://www.epa.gov/climatechange/emissions/downloads/ElectricityGeneration.pdf> (discussing applicability of proposed rule to EGUs).

215. See EPA FACT SHEET, *supra* note 212, at 1 (noting reporting requirements will give EPA essential information to inform future policy decisions).

216. Cf. *id.* (announcing that reporting requirements will provide EPA with useful information for developing future regulatory policies).

217. See 42 U.S.C. § 7412(d)(3) (2006) (setting forth requirements for developing emission standards for new and existing HAP source categories).

218. See *id.* (requiring that emission standards be set according to existing sources with lowest emissions); see also Press Release, EPA Proposes First National Reporting on Greenhouse Gas Emissions, *supra* note 213 (discussing how EPA will utilize data received through required reporting from greenhouse gas sources).

that any regulatory regime covering greenhouse gases will cite this data in setting emission standards.²¹⁹

Adding greenhouse gases to the HAP list would be a bold move. In fact, the EPA has not added a single pollutant to the HAP list, though it did consider adding CO₂ in the 1990s.²²⁰ At some point in the future, however, an aggressive EPA Administrator (be it Ms. Jackson or some future Administrator) might find it beneficial to do just that.

The most direct, immediate, and likely effect of this opinion is subjecting new EGUs to the MACT hammer.²²¹ New regulations will likely be on the way over the next few years, unless Congress passes legislation in an effort to get the EPA moving on promulgating those regulations.²²² The more controversial—but more interesting—result of this case, however, may well not be seen for some time. A future Administrator who is feeling brave may very well take this case to mean that EGUs (as well as other source categories) are stuck on the HAP source list, and end up adding HAPs (such as greenhouse gases) to the HAP list.²²³ It would be a controversial move to be sure, but the MACT requirements would have a rapid and substantial impact on emissions of those newly-listed HAPs.

*J. Brian Hudson**

219. See EPA FACT SHEET, *supra* note 212, at 1 (noting that data received through required reporting will be used to inform future policy decisions).

220. See GOV'T. ACCOUNTABILITY OFF., GAO-06-669, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM 4 (2006) (criticizing EPA for failing to update HAP list); VÉRONIQUE BUGNION AND DAVID M. REINER, MIT JOINT PROGRAM ON THE SCI. & POL'Y OF GLOBAL CHANGE, REP. NO. 57, A GAME OF CLIMATE CHICKEN: CAN EPA REGULATE GREENHOUSE GASES BEFORE THE U.S. SENATE RATIFIES THE KYOTO PROTOCOL? 15-16 (1999), *available at* <http://www.gao.gov/new.items/d06669.pdf> (citing Memorandum from Michael Shelby, Office of Pol'y, Plan & Evaluation to Karl Hausker, David Doniger, and Dick Morgenstern, Env'tl. Prot. Agency (May 31, 1994), *available at* http://globalchange.mit.edu/files/document/MITJPSPGC_Rpt57.pdf. (discussing possibility of regulating CO₂ under section 112)).

221. For a discussion of the effects of the MACT hammer, see *supra* notes 187-95 and accompanying text.

222. For a discussion of the likely development of the regulatory scheme and the effect that certain legislation might have, see *supra* notes 180-87 and accompanying text.

223. For a discussion of the possibility of adding pollutants to the HAP list, see *supra* notes 196-223 and accompanying text.

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